



# Transportation Synthesis Report

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## Alternative Dispute Resolution

*Prepared for*  
**Bureau of Highway Construction**  
**Division of Transportation Infrastructure Development**

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**WisDOT RD&T Program**  
**February 5, 2003**

*Transportation Synthesis Reports (TSRs) are brief summaries of currently available information on topics of interest to WisDOT technical staff in highway development, construction and operations. Online and print sources include NCHRP and other TRB programs, AASHTO, the research and practices of other state DOTs, and related academic and industry research.*

### **REQUEST FOR PROPOSAL**

When a dispute on a highway construction project arises between a state transportation department and a contractor, the parties normally resolve the disagreement in change orders and claims. The Bureau of Highway Construction is interested in exploring alternative approaches and asked the RD&T Program to examine the experience of other states that have engaged in alternative dispute resolution (ADR).

### **SUMMARY**

At least a dozen states, perhaps more, mediate conflicts between contractors and DOTs or negotiate a settlement in an alternative dispute resolution process before or after the claims are decided. Most states outline their procedures in contract documents. In some cases, Dispute Review Boards—neutral panels of judges—offer resolutions, but only after other ADR processes have been exhausted. In issues of right of way or land acquisition, states may also resort to ADR. A popular practice, even the federal government uses ADR and assists states in finding mediators. The practices of five states—Oregon, Florida, Texas, California and Pennsylvania—are outlined here, followed by information from FHWA on the ADR process applied to real estate disputes, four recent Journal articles, and additional resources from US DOT, FHWA and the American Arbitration Association.

### **STATE PRACTICES REGARDING CONTRACT DISPUTES**

States typically handle contract matters through a claims process that entails ADR procedures. When the state DOT has a problem with a contractor, it issues directives. The contractor complies or files a claim, engaging the ADR process. Most sources identify the following states as leaders in transportation ADR.

**Oregon.** For its specific policy, see § 00199 Disagreements, Protests and Claims in the General Requirements Section of the 2002 Standard Specifications at <http://www.odot.state.or.us/techserv/roadway/specs/2002-book/02-00100.pdf>. Essentially, Oregon follows this procedure:

1. The project manager or resident engineer reviews contractor claim for the transportation region.
2. If recommendations are unsatisfactory, issue is referred to the region's area manager for review.
3. If this result is unsatisfactory, the process moves to the central office. Beyond that it can move to arbitration, claim review board, or litigation (depending on amount of claim).

Third party neutrals have been used in a few big projects. Oregon DOT avails itself of the state's Dispute Resolution Commission, <http://www.odrc.state.or.us/>. Contact Daniel A. Anderson, Construction Claims Engineer, 503-986-3136 or [Daniel.A.Anderson@odot.state.or.us](mailto:Daniel.A.Anderson@odot.state.or.us).

**Florida.** <http://www11.myflorida.com/construction/CONSTADM/construc.htm>. This site offers guidelines and procedures for Dispute Review Boards (DRBs) in Florida's DOT, as well as contacts and lists of past DRB decisions.

1. Dispute Review Boards consist of three members, used and selected in two formats:
  - a. Project DRB, selected at the time a contract is signed, and provided for in the contract, consists of one member selected by the DOT, one by the contractor, and another by both.
  - b. Regional DRB, drawn up from a roster of DRB members, is appointed each year for each of six transportation regions. It consists of the three members, plus two alternates.
2. DRB should be engaged only when negotiations with contractor have failed.
3. DRB review includes field inspections with contractor and department representative, as well as meeting schedule.

Mark Wright, 850-414-4251 or [mark.wright@dot.state.fl.us](mailto:mark.wright@dot.state.fl.us).

**Texas.** See [http://info.sos.state.tx.us/pub/plsql/readtac\\$ext.viewtac](http://info.sos.state.tx.us/pub/plsql/readtac$ext.viewtac) for the state code. Texas DOT resolves disputes in contracting via a claim procedure outlined in Title 43. From this link, click on Title 43, Transportation; on Part 1, Texas Department of Transportation; on Chapter 9, Contract Management; on Subchapter A; on § 9.2, Contract Claim Procedure. May also be accessed from this link:

[http://info.sos.state.tx.us/pub/plsql/readtac\\$ext.TacPage?sl=R&app=9&p\\_dir=&p\\_rloc=&p\\_tloc=&p\\_ploc=&pg=1&p\\_tac=&ti=43&pt=1&ch=9&rl=2](http://info.sos.state.tx.us/pub/plsql/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=43&pt=1&ch=9&rl=2). The process emphasizes resolution during contract, but allows for post-completion dispute resolution.

1. Claims are presented to a Contract Claim Committee, consisting of engineers appointed from various uninvolved districts. This committee hears the complaint.
2. After informal meeting with contractor, committee issues decision.
3. Contested Case Procedure, §1.21 (Chapter 1, Management; Subchapter E, Procedures in Contested Cases). This is the next step for pursuing a claim, one that basically entails presenting it for a decision before the director of the Department of Transportation.

**California.** [http://www.dot.ca.gov/hq/construc/manual2001/chapter5/chp5\\_4.pdf](http://www.dot.ca.gov/hq/construc/manual2001/chapter5/chp5_4.pdf). This is the section that outlines in detail the dispute resolution process of Caltrans for specific construction contracts. Highlights include:

1. The resident engineer evaluates the complaint of the contractor for merit and, if possible, resolves it through a contract change order, or conducts a field review with a construction engineer. If they believe the claim has no merit, they consult the district construction deputy director, who may concur and notify contractor, or may suggest the next step: a district claim meeting.
2. District Claim Meeting, called by the contractor or the district construction deputy director, reviews merits of claim, including any new, relevant data submitted.
3. Board of Review is the final resolution body that can be used. It will listen to the contractor's presentation (with no new data allowed) and advise the transportation district if and how to act.

**Pennsylvania.** PennDOT hasn't a formal ADR process, and its legal staff has advised against its development. DOT officials try to anticipate and defuse problems during biweekly project process meetings, and if unsuccessful through a contracting company executive. If these are unsuccessful, they follow a claims procedure.

1. A contractor files a claim with the Contract Management Division.
2. Contractor meets with a board consisting of a PennDOT attorney, the appropriate transportation district engineer, and the central office's Chief of Quality Assurance. This panel may grant an award that is capped by state law.
3. If this proves unsatisfactory to the contractor, the contractor may appeal to the state Board of Claims.

For more, contact Pat Gardiner, 717.787.4794 or [jgardiner@state.pa.us](mailto:jgardiner@state.pa.us).

## **FEDERAL AND BEST PRACTICES REGARDING RIGHT OF WAY DISPUTES**

Real estate acquisitions for transportation needs may trigger disputes, and many federal and state agencies anticipate such problems with ADR programs.

### **FHWA Real Estate Acquisition Guide for Local Public Agencies.**

<http://www.fhwa.dot.gov/realestate/lpaguide/ch6.htm#NegotiationOptions>. Outlines acquisition process, including ADR via mediation.

**FHWA's Best Practices.** States considered effective at handling disputes during right of way processes include:

1. **Idaho.** See <http://www.fhwa.dot.gov/programadmin/contracts/idspd.htm> for procedures used by Idaho's DOT in handling contract disputes and organizing Dispute Review Boards.
2. **Oregon.** See <http://www.fhwa.dot.gov/realestate/rowmgt/chap4.htm>. See "Production Tools," paragraphs 4 and 5 for a summary of the ROW ADR process. ODOT carries an ADR Coordinator for right of way issues; see [http://www.fhwa.dot.gov/realestate/rwqms/ss\\_or02.html](http://www.fhwa.dot.gov/realestate/rwqms/ss_or02.html).
3. **Washington.** See [http://www.transportation.org/community/right\\_of\\_way/2001\\_ch10s02.pdf](http://www.transportation.org/community/right_of_way/2001_ch10s02.pdf). Washington DOT's director of Real Estate Services describes use of ADR and effective ADR strategies in real estate acquisition. Gerald Gallinger, Director of Real Estate Services, Washington DOT, 360-705-7305 or [GallinG@wsdot.wa.gov](mailto:GallinG@wsdot.wa.gov).

## **JOURNALS**

The following pieces discuss ADR practices in transportation and construction.

**McMillan, DD, "An Owner's Guide to Avoiding the Pitfalls of Dispute Review Boards on Transportation Related Projects,"** *Transportation Law Journal*, v. 27 (2), 2000; 181-203. Can be ordered online for \$0.15/page at [http://www.law.du.edu/tlj/subscription\\_information.htm](http://www.law.du.edu/tlj/subscription_information.htm). Looks critically at DRB practices, how they differ from other forms of ADR and mediation, and anticipates legal problems and possible solutions.

**Mitropoulos, P., and G. Howell, "Model for Understanding, Preventing, and Resolving Project Disputes,"** *Journal of Construction Engineering and Management*, v. 127 (3), May 2001; 223-231. Subscribers can search from <http://www.pubs.asce.org/journals/co.html>. Studies 24 construction disputes, and offers models for how disputes develop and how they can be cut short. Focus is on understanding and preventing disputes, in addition to employing ADR.

**Thompson, R.M., MC Vorster and JP Groton, "Innovations to Manage Disputes: DRB and NEC,"** *Journal of Management in Engineering*, v. 16 (5), Sept. 2000; 51-9. Non-subscribers pay \$25, subscribers nothing at <http://ojs.aip.org/dbt/dbt.jsp?KEY=JMENE&Volume=16&Issue=5>. Considers and compares two ADR processes: the ASCE's Dispute Review Board model, and the U.K.'s Council of the Institution of Civil Engineers' New Engineering Contract.

**Ernzen, J., G. Murdough and D. Drecksell, "Partnering on a Design-Build Project: Making the Three-Way Love Affair Work,"** *Transportation Research Record*, 1712, 2000; 202-211. A successful partnership process with the Arizona DOT on an \$89 million design-build project in Phoenix included the development of a dispute resolution process.

## **FURTHER RESOURCES**

**The Transportation Roster of the US Institute for Environmental Conflict Resolution.**

<http://www.fhwa.dot.gov/environment/strmlng/apr02nl.htm> and <http://www.ecr.gov/roster/troster.htm>. This FHWA-supported, independent federal agency in Tucson, Arizona, keeps a variety of rosters of dispute resolution specialists. Transportation Roster services pertain directly to environmental and landowner disputes. Roster manager Joan Calcagno keeps extensive information on the IECR roster members and their specialties; for issues regarding contract compliance or eminent domain, for example, Calcagno can offer referrals to rosters or roster members with expertise in such areas, as well as to Wisconsin roster members and promising non-members. Joan Calcagno, 520-670-5299 or [roster@ecr.gov](mailto:roster@ecr.gov).

**U.S. DOT.** <http://www.dot.gov/adr/>. Available only on USDOT contracts, these services may offer a template for state agency programs. Site offers links to a new newsletter, policy statements, etc.

1. The DOT's Board of Contract Appeals (DOTBCA) uses only two formats for ADR, both conducted by a three-judge panel – non-binding mediation, and binding summary mini-trials.
2. The DOTBCA claims to produce settlements 95 percent of the time; see <http://www.dot.gov/adr/docs/adr%20at%20dotbca%202.doc>.

For a statement of policy, see <http://www.dot.gov/adr/docs/dotadrfinalpolicyfr2.doc>. Contact: Judith S. Kaleta, senior counsel for dispute resolution, 202-493-0992 or [judy.Kaleta@ost.dot.gov](mailto:judy.Kaleta@ost.dot.gov).

**FHWA.** Official policy on dispute resolution falls under FHWA's contract administration procedures for handling claims. See [http://www.fhwa.dot.gov/programadmin/contracts/cor\\_IIIB.htm](http://www.fhwa.dot.gov/programadmin/contracts/cor_IIIB.htm). In the FHWA, Jerry Yakowenko tracks ADR best practices among state transportation agencies. 202-366-1562.

**American Arbitration Association.** <http://www.adr.org/index2.1.jsp>. Click on "Focus Areas" tab, then on "Construction." Guidelines, specifications, papers and fact sheets about ADR in construction, including Dispute Review Boards.